IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 69

PANHANDLE EASTERN PIPE LINE COMPANY,

Appellant,

v.

THE PUBLIC SERVICE COMMISSION OF INDIANA, *et al.*,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA

APPELLANT'S REPLY BRIEF

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In replying to the briefs of the Appellees and the *Amicus Curiae* (herein called collectively "Appellees"), Appellant will not burden the Court with a repetition of what is said in its main brief. We shall confine our discussion primarily to certain cases and authorities cited by Appellees which are not mentioned in our main brief.

1. Appellees cite the recent decisions of this Court in *Rice* v. *Santa Fe Elevator Corporation*, 331 U. S. 218, and *Rice* v. *Board of Trade*, 331 U. S. 247. Those cases involved the question of conflict between federal regulation and state regulation of transactions historically regarded as intrastate but subject to federal regulation because they directly

affected interstate commerce. Mr. Justice Douglas said, 331 U. S. 230:

> "Congress legislated here in a field which the states have traditionally occupied. * * * So we start with the assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."

In the case at bar, the State of Indiana seeks to regulate in a field traditionally exempted from state regulation by the Commerce Clause. Furthermore, Mr. Justice Douglas pointed out (331 U. S. 236) that, where Congress has enacted regulatory legislation, it "can act so unequivocally as to make clear that it intends no regulation except its own." We have shown in our main brief (pp. 57-65) that, when it enacted the Natural Gas Act, Congress examined the whole field of interstate commerce in natural gas and determined that interstate pipe line sales directly to industries should not be regulated; that, when the National Association of Railroad and Utility Commissioners (*Amicus* here) sought at the last session of Congress to amend the statute so as to permit state regulation of direct pipe line sales to industrial consumers, its proposed amendment was rejected. In this connection, incidentally, we think the remarks of the Corporate Appellees regarding Representative Ross Rizley (p. 42 of their brief) are highly inappropriate, if not scandalous. Mr. Rizley was not a member of the House Committee on Interstate and Foreign Commerce and House Report No. 800 was not "his report."

The Natural Gas Act confers on the Federal Power Commission jurisdiction over many phases of Appellant's business which affect Appellant's ability to make direct sales to industries and the character and extent of the service which it can undertake to render. Expansion of pipe line capacity to serve increased demands cannot be undertaken without

authorization under Sections 7(c) and (e) of the Natural Gas Act (15 U. S. C. Sections 717 f (c) and (e); the Commission may, under Section 7(a) (15 U. S. C. Sec. 717 f (a)) compel Appellant "to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural gas or artificial gas to the public; • • •".

In *Rice v. Santa Fe Elevator Corporation*, 331 U. S. 218, 236, this court said:

> "The test, therefor, is whether the matter on which the state asserts the right to act is *in any way regulated* by the Federal Act. If it is, the federal scheme prevails though it is a more modest, *less pervasive* regulatory plan than that of the state." (Italics added.)

In authorizing the Appellant to construct and operate the facilities necessary to supply the duPont Company at Fortville, Indiana, the Federal Power Commission specifically found (R. 114) that:

> "the proposed transportation and service by Panhandle Eastern to E. I. duPont de Nemours are and will be required by the present and future public convenience and necessity • • •"

Certainly, jurisdiction in the Indiana Commission to make a contrary finding and to prohibit such service would present a conflict between state and federal regulation of interstate commerce. Cf. *First Iowa Hydro-Electric Coop. v. Railroad Commission*, 328 U. S. 152, 164, cited by Appellees.

2. *Milk Control Board v. Eisenberg Farm Products*, 306 U. S. 346, is clearly distinguishable on its facts, which are

succinctly stated in the opinion of the Court (306 U. S. 352) as follows:

> "The respondent maintains a receiving station in Pennsylvania where it conducts the local business of buying milk. At that station the neighboring farmers deliver their milk. The activity affected by the regulation is essentially local in Pennsylvania. Upon the completion of that transaction the respondent engages in conserving and transporting its own property. The Commonwealth does not essay to regulate or to restrain the shipment of the respondent's milk into New York or to regulate its sale or the price at which respondent may sell it in New York."

Likewise, in *Parker* v. *Brown*, 317 U. S. 341, cited by Appellees, the state regulation was applied to the business of local producers and this Court said, 317 U. S. 361:

> "* * * the regulation here controls the disposition, including the sale and purchase, of raisins before they are processed and packed preparatory to interstate sale and shipment. The regulation is thus applied to transactions wholly intrastate before the raisins are ready for shipment in interstate commerce."

3. In support of the assertion that all sales for consumption are local and, hence, subject to local regulation, Appellees have cited a note of Professor Thomas Reed Powell appearing in Volume 58, Harvard Law Review, page 1072. They lay great emphasis on his statement that "the Court has been pretty consistent in finding localism in the consuming end". The reasoning which leads Professor Powell to this conclusion is wholly inapplicable to Appellant's business of selling natural gas directly to industrial consumers as exemplified by its sales to Anchor-Hocking at Winchester, Indiana and to duPont at Fortville, Indiana. It is summed up in his statement that:

"as a vendor the utility is like the milkman who has expectancies but no binding order. It resembles not so much the railroad or the truck as the peripatetic peddler with his pack."

Appellant is, obviously, not in the position of the milkman without a binding order or the peripatetic peddler with his pack. There is nothing in the record to support the statement of the Corporate Appellees (pp. 36-37 of their brief) that Appellant is "subdividing and selling its gas at retail" and "holds its gas in Indiana after it takes it from the transmission mains subject to the demands of local consumers." Certainly this is not true of Appellant's direct sales, as shown by its contracts with Anchor Hocking and with duPont (R. 81, 67) and the stipulated facts with respect to its deliveries to Anchor-Hocking (R. 65). Appellant has a binding contract with each of these industrial companies. Its business of selling natural gas directly to industrial consumers bears no more resemblance to that of the peddler with his pack than does its business of selling natural gas under contract to local distributing companies for resale. On the other hand Professor Powell's simile does fit accurately the business of the Pennsylvania Gas Company, which, as stated by this Court in *Missouri ex rel. Barrett* v. *Kansas Natural Gas Company*, 265 U. S. 298, 308-309, was the business of supplying gas on demand to local consumers exactly as it would be supplied by a local distributing company which had purchased the gas for resale. As we have pointed out in our main brief (pp. 36-41) this Court has never accepted as a Constitutional principle the proposition that the use to which the purchaser intends to put a commodity sold and transported in interstate or foreign commerce determines whether such sale is entitled to the protection of the Commerce Clause. We know of no case decided by this Court which distinguishes between nationalism and localism on the basis of whether the product sold or de-

livered in interstate commerce is to be resold or consumed.

4. In support of their contention that Appellant is conducting the business of a public utility in Indiana by reason of its direct sales to Anchor-Hocking and duPont, Appellees cite *Industrial Gas Company* v. *Public Utilities Commission of Ohio*, 135 Oh. St. 408; *Orndoff* v. *Public Utilities Commission of Ohio*, 135 Oh. St. 438; *Terminal Taxicab Company* v. *Kutz*, 241 U. S. 252; and *Producers Transportation Co.* v. *Railroad Commission of the State of California*, 251 U. S. 228.

In both of the Ohio cases the companies involved had no interstate business but operated solely within the State of Ohio and the only question was the extent to which their wholly intrastate business was subject to regulation under the laws of Ohio. In fact, the *Industrial Gas Company* had long been under regulation and was seeking permission to discontinue its service to domestic consumers.

In the *Terminal Taxicab Company* case it was held that, while the taxicab company was conducting a public utility business in soliciting patrons at the railroad station and at hotels, its business of furnishing automobiles from its central garage on individual arrangements with those to be served was not to be regarded as a public utility (241 U. S. 256) and this Court directed that the decree "be modified so as to restrain an inquiry into the rates charged by the plaintiff at its garage, or the exercise of jurisdiction over the same."

In the *Producers Transportation Company* case a local California corporation sought to avoid regulation by the Railroad Commission of California as a common carrier, although the evidence showed that, in operating its oil pipe line, it had transported oil for the public generally. The issue was whether the company had been denied the protection of the due process clause of the Fourteenth Amendment and the contract clause of Section 10 of Article 1 of the Constitution. No interstate transportation

or sale was involved. It may be noted, however, that Mr. Justice VanDevanter said, 251 U. S. 230:

> "It is, of course, true that if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts and never was devoted by its owner to public use, that is, to carrying for the public, the State could not by mere legislative fiat or by any regulating order of a commission convert it into a public utility or make its owner a common carrier;"

The record in this case (paragraphs 10, 11 and 12 of stipulation, R. 43-46) shows that all of Appellant's sales in Indiana both to distributors for resale and to direct industrial customers have been made under strictly private contracts. The statement in the brief of Appellee Public Service Commission of Indiana (p. 5) that Appellant operates "dehydrated plants" and "gasoline plant" in Indiana is not correct (R. 41) and must have been made inadvertently. Since the advent of the Natural Gas Act, Appellant's contracts with distributing companies have been placed on file with the Federal Power Commission as rate schedules and its contracts for the direct sale of natural gas to industrial consumers have been furnished the Commission in compliance with the Commission's rules and regulations. (Cf. *Panhandle Eastern Pipe Line Company* v. *Federal Power Commission*, 324 U. S. 635, 647, Note 5.)

Appellee Public Service Commission of Indiana contends (pp. 49 to 55 of its brief) that Appellant is a public utility within the meaning of the Indiana Public Service Commission law and, therefor, subject to regulation in Indiana because the Appellant is selling gas in Indiana to distributing companies for resale. It is argued that, since the Supreme Court of Indiana has ruled in this case to this effect, such ruling is binding on this Court. This argu-

ment is patently fallacious. Cases are cited in support of the proposition that an interpretation of a state statute by the highest court of such state is binding upon this Court. No case is cited, however, in support of the proposition that this Court is bound by a ruling of a state court that interstate transactions are subject to state regulation because the state court determines that such transactions constitute a utility business within the scope of a state regulatory statute.

5. Appellees cite *Prudential Insurance Company of America* v. *State of Indiana*, 328 U. S. 823, *Hoopeston Canning Co.* v. *Cullen*, 318 U. S. 313, and *Robertson* v. *California*, 328 U. S. 440, cases involving the insurance business. Here again, the Court was dealing with a field traditionally occupied by the states. State regulation of the insurance business had gone unchallenged from the decision of this Court in *Paul* v. *Virginia*, 8 Wall. 168 until its ruling in *United States* v. *Southeastern Underwriters Association*, 322 U. S. 533, that the business of insurance companies was sufficiently interstate in character to bring it within the scope of the anti-trust laws. The latter decision was quickly followed by the passage of the McCarran-Ferguson Act (15 U. S. C., Section 1011 *et seq.*) authorizing the continuation of state regulation of the insurance business. No statute similar to the McCarran-Ferguson Act has been enacted by Congress with respect to the Natural Gas industry.

As pointed out in Appellant's main brief (pp. 27-34), while the question has not been decided by this Court, interstate sales of natural gas directly from the interstate pipeline to industrial customers have consistently been held by other courts to be protected from state regulation by force of the Commerce Clauses.

6. The Corporate Appellees assert (p. 4 of their brief) that *State ex rel. Cities Service Company* v. *Public Service*

Commission, 337 Mo. 809, 85 S. W. (2d) 890, cert. den. (1936), 296 U. S. 657 (which was cited as controlling in *State ex rel. Panhandle* v. *Pub. Service Comm.* (Mo. 1936), 93 S. W. (2d) 675) was "in effect overruled" by *Mississippi River Fuel Corporation* v. *Smith* (Mo. 1942) 164 S. W. (2d) 370. We find nothing in the opinion of the Supreme Court of Missouri in the latter case to support this contention. The case involved a Missouri sales tax and the issue was whether Mississippi River Fuel Corporation was under a duty to collect the tax from purchasers of its gas and to remit the same to the State Auditor. The Supreme Court of Missouri expressly pointed out that its prior ruling in the *Cities Service Company* case was not affected. It said (164 S. W. (2d) 376):

> "The purpose of the Cities Service case was to determine whether that company, which transported its gas by pipe line from other states was a public utility, engaged in Missouri, in the sale and distribution of gas and as such required, under our statute, to file schedule of Rates.
>
> "The majority opinion * * * held that Cities Service was not subject to regulation in Missouri. But the purpose of the Cities Service case was vastly different from the purpose of the present case."

Appellees also cite *American Bridge Company* v. *Smith* (Mo. 1944) 179 S. W. (2d) 12, *Arkansas-Louisiana Gas Company* v. *Hardin* (Ark. 1944) 176 S. W. (2d) 903 and *Southern Kraft Corporation* v. *Hardin* (Ark. (1943) 169 S. W. (2d) 637). All of these cases involved the duty of the seller to collect from the purchaser and to remit to the State a sales tax. In the *American Bridge Company* case the seller was a manufacturer of fabricated structural steel. The Supreme Court of Missouri made clear the distinction between *regulation* of commerce and a state tax imposed after the merchandise had reached its journey's end. In the two Arkansas cases the Supreme Court

of Arkansas refers to the fact that in *Arkansas-Louisiana Gas Company* v. *Department of Public Utilities*, 304 U. S. 61, this Court did not pass upon the question of whether the sales involved were interstate transactions. It stated that it must, therefore, adhere to its view stated in that case that, under the "broken package" rule, the sales were intrastate transactions. The Court concedes, however (*Southern Kraft Corporation* v. *Hardin*, 169 S. W. (2d) 637, 641) that the transporter of gas from another state is not subject to the laws of the state of delivery if he causes "the gas to be piped to a customer and received by that customer in the most direct and compact practicable form." We submit that Appellant's transportation and sale of gas to Anchor-Hocking and to du Pont fully meet these requirements for exemption from state regulation.

7. Finally, Appellees cite *Munn* v. *Illinois*, 94 U. S. 113, and *Townsend* v. *Yeomans*, 301 U. S. 441 in support of the proposition that Appellant's direct sales to industrial consumers in Indiana are subject to regulation by the State of Indiana. In both of those cases, the activities sought to be regulated, while occurring in the stream of interstate commerce and directly affecting such commerce, were local in character; whereas in the case at bar the transactions involved are, of themselves, interstate commerce. Furthermore, the grain warehouses of Chicago and the tobacco warehouses of Georgia were held to be affected with a public interest because of factual considerations clearly not present here. Appellant's two direct sales in Indiana cannot be compared with the tremendous number of transactions involving the public handled by the grain elevators of Chicago and the tobacco warehouses of Georgia.

The briefs of the Appellees make it clear that they seek to uphold the jurisdiction of the Public Service Commission of Indiana in order to protect the business of the Corporate Appellees from any competition of Appellant in the sale of natural gas to large industrial plants in

Indiana. They lay great emphasis upon the financial loss which the Corporate Appellees fear they will sustain unless *Appellant is forbidden* by the Indiana Public Service Commission from making direct sales to industrial customers.

We have shown in Appellant's brief at pages 53-57 that this Court has never recognized local interest of this character as a basis for state regulation of interstate commerce. Nevertheless, this Court can hardly believe that the claimed losses, as prophesied by Appellees, would actually occur. The record shows that, in spite of Appellant's efforts to obtain direct sales in Indiana, it had obtained only one customer up to the time that these proceedings were commenced before the Indiana Commission, October 13, 1944; that this customer, Anchor-Hocking Glass Corporation, had been obtained by a contract made May 11, 1942 (R. 81); that the contract with the duPont Company was made December 14, 1944 (R. 67) but service was not commenced until authorization from the Federal Power Commission was granted July 10, 1945 (R. 112-115). On the other hand, the Corporate Appellees had 252 industrial customers throughout Indiana, and, although Appellant was not threatened with restraint by the State of Indiana until October 13, 1944, Appellant did not take a single one of these 252 industrial customers from the Corporate Appellees. It is true that prior to May 11, 1942, Anchor-Hocking was served by Indiana Gas Distribution Corporation (R. 51-52). That company, however, a local Indiana distributing company serving over 2,000 gas consumers (R. 50), wholly independent of Appellant (R. 52), has not intervened in these proceedings to complain of the loss of that industrial business to Appellant, and there is no evidence in the record to show that its service or rates to its domestic, commercial and small industrial consumers were adversely affected thereby.

Appellees would have this Court overlook the actual facts of this case and subject Appellant's interstate business to regulation by the State of Indiana on the extremely remote, speculative assumption that Appellant will, unless subjected to state regulation, take away from the Corporate Appellees all of their 252 industrial customers located in various places throughout the State of Indiana. Strangely enough, in spite of the earnestness and emphasis with which Appellees press their argument based on this prophecy as to what may happen in the future, the Corporate Appellees urge (page 20 of their brief) that

> "It need not now be determined whether it would be a reasonable exercise of the state's power, and a proper discharge of its duty, to protect local interest in the business or commerce under consideration, if the Public Service Commission of the state were to issue an order forbidding Panhandle, a Delaware Corporation, to serve its gas to ultimate consumers in Indiana, * * *"

Stranger still, the Corporate Appellees assert (at page 51 of their brief) that jurisdiction of the Indiana Commission over these interstate sales by Appellant is necessary in order that Appellant may be *compelled*, through the exercise of such jurisdiction, to make direct sales to all those who desire the service; that Appellant must not be permitted "to pick and choose those customers to which it will make such sales."

In short, Appellees ask this Court to sustain state power to *forbid* direct interstate sales and to *compel* direct interstate sales regardless of the effect of such local regulation upon Appellant's interstate transportation and sale of natural gas in the other states through which its pipe line passes.

It must be conceded that Appellant cannot serve in the aggregate to all customers, including distributing utilities and direct industrial plants, over its system a greater volume of gas than the capacity of its pipe line system will transport and deliver. The construction and operation of additional pipe line facilities to increase such capacity cannot be undertaken by appellant without the authorization of the Federal Power Commission under Section 7 of the Natural Gas Act (15 U. S. C. Section 717f). Under such circumstances, Appellant must of necessity have freedom to determine whether it has the requisite pipe line capacity and supply of gas to serve additional industrial plants who may desire its service. An intolerable burden on interstate commerce would be imposed if each one of the states through which Appellant's pipe line passes could exercise the jurisdiction sought to be sustained here. A major interference with the jurisdiction of the Federal Power Commission under the Natural Gas Act over Appellant's sales of natural gas to distributing utilities for resale would certainly result.

Respectfully submitted,

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